IN THE

Supreme Court Of The United States

_____ TERM, 1979

NO. 79-451

MARIE FRAKES ..... *Petitioner*

VS.

RAY HUNT, ET AL ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Petitioner, MARIE FRAKES, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding June 25, 1979.

I. OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at 266 Ark. 171, 583 SW2d 497 (1979) and attached as Appendix "A". The dissenting opinion of Mr. Justice Fogleman is reported at 266 Ark. 175, 583 SW2d 499 and is attached as Appendix "B".

II. JURISDICTION

The opinion of the Arkansas Supreme Court was filed June 25, 1979, and the judgment was entered that date. This Petition for Writ of Certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

III. QUESTION PRESENTED

Whether the doctrine enunciated in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977), holding that illegitimates as a class may not be precluded from inheriting through their father, applies to a case in which the illegitimate's father died prior to the date *Trimble* was announced.

IV. STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Ark. Stat. Ann. §61-141(d) provides: An illegitimate child or his decendants may inherit real or personal property in the same manner as a legitimate child from such child's mother or her blood kindred; but such child may not inherit real or personal property from his father or from his father's blood kindred.

The first section of Amendment 14 to the Constitution of the United States of America provides: All persons born or nationalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

V. STATEMENT OF THE CASE

Linn Hunt died intestate on April 19, 1972. He had never married. At the time of his death, Linn Hunt was the owner of several hundred acres in Van Buren County, Arkansas.

On September 26, 1977, Petitioner filed a complaint in the Van Buren Chancery Court seeking to quiet title to the acreage owned by Linn Hunt at his death. Respondents are the nieces and nephews and children of deceased nieces and nephews of Linn Hunt. In the action filed in the Van Buren Chancery Court, they were defendants. Within the time permitted by law, Respondents answered Petitioner's complaint asserting among other things that Petitioner was precluded from inheriting as the child of Linn Hunt since she is illegitimate. Respondents invoked Ark. Stat. Ann. §61-141(d) which precludes an illegitimate from inheriting through his father. Petitioner replied to Respondent's answers admitting that she is an illegitimate, but asserting that Ark. Stat. Ann. §61-141(d) is unconstitutional since it denied her equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Trial was held before the Chancellor in September, 1978. On October 20, 1978, the Chancellor entered his opinion. The Chancellor found that Petitioner had proven that she is the illegitimate daughter of Linn Hunt. The Chancellor found further that Ark. Stat. Ann. §61-141(d) is unconstitutional, having been held so by the principal announced in *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977). The Chancellor nevertheless held that Petitioner was precluded from inheriting through her father because the facts in the case before him could

be distinguished from the facts in *Trimble*. The Chancellor expressly declined to rule on the issue whether *Trimble* should be given retroactive application to a death occurring approximately five years before it was decided by the United States Supreme Court. The Chancellor reasoned that his ruling would not be affected whether *Trimble* was applied retroactively.

Upon appeal by Petitioner and cross-appeal by Respondents, the Supreme Court of Arkansas held that Ark. Stat. Ann. §61-141(d) is unconstitutional, but that the doctrine of *Trimble* should not be applied retroactively. Two Justices dissented, reasoning that *Trimble* should be applied retroactively. The decision was based solely on the question of retroactive application of the doctrine enunciated in *Trimble*. No issue of state law was decided.

VI. REASON FOR GRANTING THE WRIT

THE DECISION BELOW RAISES THE SIGNIFICANT AND RECURRING FEDERAL QUESTION WHETHER THE DOCTRINE ENUNCIATED BY THIS COURT IN *TRIMBLE V. GORDON* SHOULD BE APPLIED RETROACTIVELY

In *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977), this Court held that the Illinois statute which is almost identical to Ark. Stat. Ann. §61-141(d) is unconstitutional. Both the Chancellor before whom this cause was tried and the Supreme Court of Arkansas recognize that under the principal enunciated in *Trimble*, Ark. Stat. Ann. §61-141(d) is unconstitutional. Because Linn Hunt died prior to the date *Trimble* was announced, the Courts below were left to decide whether the doctrine enunciated in *Trimble* had retroactive application.

Both the majority and dissenting opinions of the Justices of the Supreme Court of Arkansas show that the issue which they were determining was a federal question. The majority opinion begins with the sentence:

> "The pivitol issue in this case is whether we should give retroactive effect to *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977)."

After discussing the fact situations which gave rise to this litigation, the majority opinion recognizes that Ark. Stat. Ann. §61-141(d) is constitutionally invalid under *Trimble v. Gordon*. The opinion, nevertheless, holds that Petitioner is precluded from inheriting through her father since the doctrine of *Trimble v. Gordon* will not be applied to a death occurring prior to the date it was rendered by the United States Supreme Court.

The majority opinion reasons that had Linn Hunt contacted an attorney prior to his death, that attorney could have informed him that his illegitimate child would not take under the law of decent and distribution relying confidently upon *Labine v. Vincent, Adm'r*, 401 U.S. 532, 91 S.Ct. 1017, 28 L. Ed. 2d 288 (1971). The majority further reasoned that uncertainty of titles could result in an unwillingness to improve real property, that the pretermitted child statute could create problems and that the Kentucky and Tennessee Courts had refused to give retroactive application to the *Trimble* doctrine. The majority rules expressly on the question of retroactivity, as opposed to distinguishing the facts in the present case from those of *Trimble*. The opinion states:

> "Based upon the foregoing authorities and to prevent chaotic conditions arising from the lack of title to real

property, we affirm the trial court — not for the reasons stated by the trial court — but on the basis that *Trimble v. Gordon,* supra, should not be applied retroactively."

The dissenting opinion deals at great length with the question whether the holding of *Trimble v. Gordon* should be applied retroactively. Mr. Justice Fogleman reviewed extensively United States Supreme Court authority upon this question. Mr. Justice Fogleman states:

"As Appellants have suggested, there is a sound basis for rejecting an attack upon the title to property in the hands of a bona fide purchaser for value in reliance upon a title which is vested in the legitimate heirs of a deceased father. This is not the case here. The statute of limitations on recovery of real property has not run in this case. I find no basis in the evidence for applying the doctrine of laches or estoppel here. The evidence indicates that there has been no administration on Linn Hunt's estate, although he had been dead more than five years when this suit was filed. If there had been a determination of heirship, it would certainly have been made known.

In my opinion, we should assume that *Trimble* has retroactive effect, until the United States Supreme Court has held to the contrary . . ."

Petitioner respectfully submits that the foregoing statements demonstrate clearly that the Supreme Court of Arkansas has decided a federal question.

The question presently before the Court is of great significance. Of course, there were many deaths prior to the date of *Trimble* where no probate proceeding had been

commenced or the probate was not complete. In the case at bar, no effort had been made to probate the estate of Linn Hunt or to establish heirship. Furthermore, there was no evidence that the nieces and nephews and children of nieces and nephews of Linn Hunt divided the property among themselves, sold the property or listed it for sale, mortgaged the property, made improvements on the property, or did any other act in reliance upon their asserted position that they are the heirs at law of Linn Hunt. Petitioner was the first person to present the matter of intestate succession of the estate of Linn Hunt before the Courts of the State of Arkansas. In doing so, Petitioner alleged that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States prohibited the State of Arkansas from refusing her the right to inherit from her father because she is illegitimate. Had the Respondents caused the estate of Linn Hunt to be administered before the Probate Court; or had they sold the property to a bona fide purchaser for sale; or had they taken any significant action in reliance upon their putative heirship, the Courts would be required to balance the rights of Respondents, or those asserting claims through them, against the rights of the Petitioner to equal protection of the law. However, Respondents neither alleged nor proved at trial any reliance upon the unconstitutional statute.

The question presently before this Court has already been presented to the appellate courts of several states. The New Jersey Superior Court considered the question in a case *In the Matter of the Estate of Sharp,* 151 N.J. Super. 579, 377 A.2d 730 (1977). The Court stated:

"Since decedent died before *Trimble v. Gordon* was decided, there is a retroactivity question. Certainly

a decision of unconstitutionality may in an appropriate case be prospective only. (Case Cited). And prospective application may be particularly fair in a property case where persons have justifiably relied on prior law. (Cases Cited). Thus, the Court does not suggest that estates of intestate male decedents who died before *Trimble v. Gordon* were wrongfully distributed when illegitimate children were not included. Nor does the Court suggest that if a testate male decedent died before *Trimble v. Gordon* and failed to mention or provide for an illegitimate child born after the execution of his will, that the will, if probated before *Trimble v. Gordon,* should have been treated as revoked in whole or in part. (Statute Cited). Such cases must be decided on the facts as they are presented. This Court simply holds that where the death was before *Trimble v. Gordon* but the will was not offered for probate until after that case was decided, and where the will is so ambiguous that no beneficiary could have reasonably relied on its terms as to the receipt of any gift, *Trimble v. Gordon* should be applied."

The Texas Court of Appeals has also been presented this issue. In *Lovejoy v. Lillie,* 569 SW2d 501 (Court of Appeals of Texas, 1978), decedent died in 1971. Probate was commenced in 1973 and application for determination of heirship was filed in 1974. The Texas Court took the position that the date of the decision in *Trimble* was unimportant, holding that the doctrine of *Trimble* should be applied.

The Supreme Court of Florida in the case *Estate of Burris,* 361 So.2d 152 (Fla. 1978), applied the doctrine of *Trimble* to a death which occurred in May, 1975.

In *Pendelton v. Pendelton,* 560 SW2d 538 (Ky. 1977), the Kentucky Supreme Court held that the doctrine of *Trimble* would be applied prospectively only. The Court stated expressly that its opinion would have no retroactive effect upon the devolution of any title occurring prior to the date of the *Trimble* opinion.

The Arkansas Supreme Court cited *Allen v. Harvey,* 568 SW2d 829 (Tenn. 1978), as authority for the position that the *Trimble* doctrine would not be applied retroactively. The Tennessee Court held in this case that the illegitimate could inherit although the illegitimate's father died in 1942 and the aunt of the illegitimate through whom the illegitimate claimed died in 1971 or before. The Supreme Court of Tennessee stated:

> "The application of this decision shall be prospective only, but it shall govern any cases pending in the Courts of Tennessee, on the date this opinion is released, asserting the right of children born out of wedlock to inherit from their natural father."

The Tennessee Court decided this case on June 29, 1978, over a year after *Trimble* was decided. The Court granted to those persons who relied upon *Trimble* the right to assert the doctrine of *Trimble* where a death occurred prior to the date of *Trimble* if that action was filed prior to the date of *Allen.* Petitioner would have been permitted to assert her claim under this holding.

Petitioner respectfully submits that the cases cited show that the question whether *Trimble* shall have retroactive application is a recurring question within the various states. Petitioner further submits that the cited cases show a lack of consistency among the states upon this issue and

it is greatly desirable that this Court rule expressly whether the doctrine of *Trimble* is to be applied to deaths occurring prior to the date *Trimble* was announced.

VII. CONCLUSION

The Writ of Certiorari should be granted and the Supreme Court of Arkansas directed to give retroactive application to the doctrine of this Court announced in *Trimble v. Gordon.*

Respectfully submitted,

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Appendix

APPENDIX "A"

EN BANC

SUPREME COURT OF ARKANSAS

No. 79-33

MARIE FRAKES, *Appellant* v. RAY HUNT, ET AL, *Appellees*	Opinion Delivered June 25, 1979 Appeal From Van Buren Chancery Court CARL B. McSPADDEN, *Chancellor* *Affirmed*

CONLEY BYRD, *Associate Justice*

The pivotal issue in this case is whether we should give retroactive effect to *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977). The facts giving rise to this litigation show that Linn Hunt died intestate on April 19, 1972. He had never married but had numerous collateral heirs, appellees Ray Hunt, et al. The principal asset of his estate was more than 400 acres of land which appellees have had possession of since Linn Hunt's death. There is a statute, Ark. Stat. Ann. §61-141(d) (Repl. 1971), which prevents illegitimate children from inheriting from their fathers. Our statute is almost identical to the Illinois statute declared unconstitutional on equal protection grounds in *Trimble v. Gordon, supra,* on April 26, 1977. On September 26, 1977,

appellant Marie Frakes brought this action, contending that she was the illegitimate child of Linn Hunt and that in view of *Trimble v. Gordon, supra,* she inherited the 400 acres of land that Linn Hunt owned as his sole heir. The trial court held Ark. Stat. Ann. §61-141(d) (Repl. 1971) was unconstitutional in view of *Trimble v. Gordon, supra.* He also found that appellant was the illegitimate child of Linn Hunt. However, the trial court ruled that appellant was not within the class of illegitimates who would be permitted to inherit from her father, since there was no semblance of a parent-child relationship nor was there a formal order establishing paternity. Both parties have appealed.

We, as did the parties in oral argument, recognize that Ark. Stat. Ann. §61-141(d) (Repl. 1971) is constitutionally invalid under *Trimble v. Gordon, supra,* — see *Lucas v. Handcock, Adm'x.,* (handed down this same date). In her brief, appellant, with respect to the pivotal issue of whether she can rely upon *Trimble v. Gordon, supra,* states:

> "Appellant recognizes that if Ark. Stat. Ann. 61-141(d) is declared unconstitutional the Court will be required, in some cases, to enunciate rules that will protect those persons who have relied upon the statute. In some cases, equity and justice will require exception to permitting inheritance by illegitimates where heirs or bona fide purchasers for value have acted in reliance on a justified assumption that no illegitimate exists. Appellant contends that in her case no necessity exists for enunciating such a rule since no bona fide purchasers for value are involved in the litigation and since there has been no reliance upon the non-existence of an illegitimate by those nieces and nephews and

> children of nieces and nephews who would have inherited from Linn Hunt, but for Appellant."

Arkansas, like most states, permits a person to will his property to whomever he wishes to the exclusion of children. To exclude children, however, Ark. Stat. Ann. §60-507 (Repl. 1971), requires that a child be mentioned specifically or as a member of a class. If a person does not elect to make a will, then his property, upon his death, is distributed according to the laws of descent and distribution. Consequently, a person of modest means who is satisfied with the persons to whom distribution of his property would be made under the law of descent and distribution has no reason to go to the trouble and expense of making a will. Had Linn Hunt made an inquiry of his lawyer as to the law of descent and distribution as much as a year before his death, his lawyer with confidence, citing *Labine v. Vincent, Adm'r,* 401 U.S. 532, 91 S.Ct. 1017, 28 L. Ed. 2d 288 (March 29, 1971), could have informed Linn Hunt that an illegitimate child would not take under the law of descent and distribution.

Furthermore, should we accept appellant's argument, we would run head-on into a title problem that could materially hamper the improvement of property, for Ark. Stat. Ann. §37-226 (Repl. 1962) provides:

> "If any person entitled to bring any action, under any law of this state, be at the time of the accrual of the cause of action, under twenty-one [21] years of age, or insane or imprisoned beyond the limits of the state, such person shall be at liberty to bring such action within three [3] years next after full age, or such disability may be removed."

See, also, the pretermitted child statute, Ark. Stat. Ann. §60-507(b) (Repl. 1971).

When the Supreme Court of Kentucky was faced with the problem before us in *Pendelton v. Pendelton,* (Ky. 1978) 560 SW2d 538 it held:

> "Insofar as it declares the invalidity of KRS 391.090 this opinion shall have no retroactive effect upon the devolution of title occurring before April 26, 1977 (the date of the Trimble opinion), except for those specific instances in which the depositive constitutional issue raised in this case was then in the process of litigation."

The Supreme Court of Tennessee after holding its illegitimate statute invalid in *Allen v. Harvey,* Tenn. 568 SW2d 829 (1978) stated:

> "The decision we reach today — that a child born out of wedlock may inherit from and through his father — is specifically limited to cases where paternity is established by clear and convincing proof and to cases where rights of inheritance have not finally vested. All cases in conflict with this decision are hereby expressly overruled.
>
> The application of this decision shall be prospective only but it shall govern any cases pending in the courts of Tennessee on the date this opinion is released, asserting the right of children born out of wedlock to inherit from their natural father."

Based upon the foregoing authorities and to prevent chaotic conditions arising from the lack of title to real property, we affirm the trial court — not for the reasons

stated by the trial court — but on the basis that *Trimble v. Gordon, supra,* should not be applied retroactively.

By a cross appeal, appellees contend that the trial court erred in finding that appellant was the illegitimate child of Linn Hunt. While we have some doubt whether the evidence of paternity is sufficient to sustain the heavy burden of proof required to prove paternity, we need not address that issue as our decision on the retroactive effect of *Trimble v. Gordon, supra,* makes the finding of paternity moot.

Affirmed.

Fogleman and Purtle, JJ., dissent.

APPENDIX "B"

EN BANC

SUPREME COURT OF ARKANSAS

No. 79-33

MARIE FRAKES, *Appellant* v. RAY HUNT, ET AL, *Appellees*	Opinion Delivered June 25, 1979 Appeal From Van Buren Chancery Court CARL B. MCSPADDEN, *Chancellor* *Dissenting Opinion*

JOHN A. FOGLEMAN, *Justice*

With all due respect to my brethren of the majority and to the Supreme Courts of Tennessee and Kentucky, I cannot join in the holding that *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977), shall not be applied retroactively. It is not within the power of this court to say whether the decisions of the United States Supreme Court are retroactive. That is a matter for that court and that court alone. See *Laabs v. Wisconsin Tax Commission,* 218 Wis. 414, 261 NW 404 (1935). There is no indication in the opinion in *Trimble* that it should be restricted to prospective effect. The fact that there was no such indication weighs heavily in favor of retroactivity. *Stocker v. Hutto,* 547 F.2d 437 (8 Cir., 1977); *Chavez v. Rodriguez,* 540 F.2d 500 (10 Cir., 1976).

In *Trimble,* the United States Supreme Court held that an adjudication in a paternity action was sufficient to establish the illegitimate child's right to claim a child's share without compromising the state's legitimate interest in the accurate and efficient disposition of property at the death of that child's blood father. The case was remanded for further proceedings not inconsistent with the opinion. This would seem to indicate that the decision was not to be given prospective effect only.

Until the decision in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed. 2d 601 (1965), both common law and decisions of the United States Supreme Court recognized a general rule of retrospective effect for the constitutional decisions of that court, subject to limited exceptions. The court declared that it was charting new ground in *Linkletter,* which was an exception to the general rule. In *Linkletter* and *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L. Ed. 2d 248 (1969), the criteria for determining whether such a decision was to be accorded retrospective or prospective effect were established. *Robinson v. Neil,* 409 U.S. 505, 93 S.Ct. 876, 35 L. Ed. 2d 29 (1973). But those criteria relate primarily to constitutional rules relating to criminal trials, and have little bearing on equal protection cases. It was pointed out in *Desist,* however, that extent of reliance on the continuing validity of previous decisions was to be applicable only when the purpose of the new constitutional rule did not clearly favor either retroactivity or prospectivity.

The court's decisions denying retroactivity, outside the criminal law field, related primarily to procedural rules. See *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L. Ed. 2d 440 (1964).

We are here dealing with a decision holding unconstitutional a statutory provision not pertaining to criminal

law or to procedural rules. It has been said that such a statute must be treated as if it had never been passed. *Morgan v. Cook,* 211 Ark. 755, 202 SW2d 355; *State v. Williams-Echols Dry Goods Co.,* 176 Ark. 324, 3 SW2d 340; *Cochran v. Cobb,* 43 Ark. 180. We have said that no rights can be predicated on an unconstitutional statute. *Road Improvement Dist. No. 4 v. Burkett,* 163 Ark. 578, 260 SW 718. Perhaps the matter has been overstated in these cases, but none of them have been overruled, and, although I realize this court has given only prospective effect to decisions overruling previous decisions in some cases, I am unaware of any case in which we have said that a decision holding a statute unconstitutional had prospective effect only. To do so is to say, in effect, that the statute was valid today, or perhaps yesterday, but from now on it is invalid. This is certainly not logical.

Perhaps there is a more desirable means of dealing with the effect of a decision holding a statute unconstitutional. Dictum in *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317, 84 L. Ed. 329 (1940), was the first indication that the United States Supreme Court would do so. There the court said:

> The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County,* 118 U.S. 425, 442, 30 L. Ed. 178, 186, 6 S.Ct. 1121; *Chicago I. & L. R. Co. v. Hackett,* 228 U.S. 559, 566, 57 L. Ed. 966, 969, 33 S.Ct. 581. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must

> be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appropriately confine our consideration to the question of res judicata as it now comes before us.

Ever since *Linkletter* was decided, the United States Supreme Court has struggled with the problem of nonretroactivity, which might have been solved there by applying the result reached in *Chicot County Drainage District v. Baxter State Bank,* supra. A four-judge plurality addressed itself to the problem and invented a new approach in *Lemon v. Kurtzman,* 411 U.S. 192, 93 S.Ct. 1463, 36 L. Ed. 2d 151 (1973). They said:

Claims that a particular holding of the Court should be applied retroactively have been pressed on us frequently in recent years. Most often, we have been called upon to decide whether a decision defining new constitutional rights of a defendant in a criminal case should be applied to convictions of others that predated the new constitutional development. *E.g., Robinson v. Neil,* 409 U.S. 505, 35 L. Ed. 2d 29, 93 S.Ct. 876 (1973); *Adams v. Illinois,* 405 U.S. 278, 31 L. Ed. 2d 202, 92 S.Ct. 916 (1972); *Desist v. United States,* 394 U.S. 244, 22 L. Ed 2d 248, 89 S.Ct. 1030 (1969); *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S.Ct. 1967 (1967); *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S.Ct. 1772 (1966); *Tehan v. Shott,* 382 U.S. 406, 15 L. Ed. 2d 453, 86 S.Ct. 459 (1966); *Linkletter v. Walker,* 381 U.S. 618, 14 L. Ed. 2d 601, 85 S.Ct. 1731 (1965). But "in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases." *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106, 30 L. Ed. 2d 296, 92 S.Ct. 349 (1971); *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481, 20 L. Ed 2d 1231, 88 S.Ct. 2224 (1968); *Simpson v. Union Oil Co.,* 377 U.S. 13, 12 L. Ed. 2d 98, 84 S.Ct. 1051 (1964); *England v. State Board of Medical Examiners,* 375 U.S. 411, 11 L. Ed. 440, 84 S.Ct. 461 (1964). We have approved nonretroactive relief in civil litigation, relating, for example, to the validity of municipal financing founded upon electoral procedures later declared unconstitutional, *Cipriano v. City of Houma,* 395 U.S. 701, 23 L. Ed. 2d 647, 89 S.Ct. 1897 (1969), and *City of Phoenix v. Kolodziejski,* 399 U.S. 204, 26 L. Ed. 2d 523, 90 S.Ct. 1990 (1970); or to the validity of

elections for local officials held under possibly discriminatory voting laws, *Allen v. State Board of Elections,* 393 U.S. 544, 22 L. Ed. 2d 1, 89 S.Ct. 817 (1969). In each of these cases, the common request was that we should reach back to disturb or to attach legal consequence to patterns of conduct premised either on unlawful statutes or on a different understanding of the controlling judge-made law from the rule that ultimately prevailed.

Appellants urge, as they did in the District Court, a strange amalgam of flexibility and absolutism. Appellants assure us that they do not seek to require the schools to disgorge prior payments received under Act 109; in the same breath, appellants insist that the presently disputed payment be enjoined because an unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County,* 118 U.S. 425, 442, 30 L. Ed. 178, 6 S.Ct. 1121 (1886). Conceding that we have receded from *Norton* in a host of criminal decisions and in other recent constitutional decisions relating to municipal bonds, appellants nevertheless view those precedents as departures from the established norm of Norton. We disagree.

The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is "among the most difficult of those which have engaged the attention of courts, state and federal . . . ." *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 374, 84 L. Ed. 329, 60 S.Ct. 317 (1940). Consequently, our

holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' " *Linkletter,* supra, at 627, 14 L. Ed. 2d 601, quoting from *Chicot County Drainage Dist.,* supra, at 374, 84 L. Ed. 329. However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of non-retroactivity. Appellants offer no persuasive reason for confining the modern approach to those constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none.

In *Linkletter,* the Court suggested a test, often repeated since, embodying the recent balancing approach; we looked to "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.,* at 629, 14 L. Ed. 2d 601. Those guidelines are helpful, see infra, at 201-203, 36 L. Ed. 2d at 162, 163, but the problem of *Linkletter* and its progeny is not precisely the same as that now before us. Here, we are not considering whether we will apply a new constitutional rule of criminal law in reviewing judgments of conviction obtained under a prior standard; the problem of

the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional. True, the temporal scope of the injunction has brought the parties back to this Court, and their dispute calls into play values not unlike those underlying *Linkletter* and its progeny. But however we state the issue, the fact remains that we are asked to re-examine the District Court's evaluation of the proper means of implementing an equitable decree. Cf. *United States v. Estate of Donnelly,* 397 U.S. 286, 295, 25 L. Ed. 2d 312, 90 S.Ct. 1033 (1970); *id.,* at 296-297, 25 L. Ed. 2d 312 (Harlan, J., concurring).

In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15, 27 n 10, 28 L. Ed. 2d 554, 91 S.Ct. 1267 (1971). Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. * * * *

The plurality then disposed of the effect of the statute in the proceeding before it by treating it as an equity proceeding. That position did not draw a majority. One justice concurred only in the judgment. One justice did not participate. Three took the position that the problem of retroactivity involved in criminal cases was inapplicable and that a losing litigant has no equity in the fact that he relied on advice that turned out to be unreliable or wrong. They felt that only a compelling circumstance should limit a judicial ruling to prospective applications.

As appellants have suggested, there is a sound basis for rejecting an attack upon the title to property in the hands of a bona fide purchaser for value in reliance upon a title which had vested in the legitimate heirs of a deceased father. That is not the case here. The statute of limitations on recovery of real property had not run in this case. I find no basis in the evidence for applying the doctrines of laches or estoppel here. The evidence indicates that there has been no administration on Linn Hunt's estate, although he had been dead more than five years when the suit was filed. If there had been a determination of heirship, it would certainly have been made known.

In my opinion, we should assume that *Trimble* has retroactive effect, until the United States Supreme Court has held to the contrary. I would remand this case, however, to the trial court for a reconsideration of the question of paternity. The trial judge found that appellant had shown by a preponderance of the evidence that she was the illegitimate child of Linn Hunt. We have said that this relationship must be shown by clear and convincing evidence. There are reasons to question whether appellant met that test. It is significant to me that the bastardy action was not pursued to judgment, that appellant never had but one conversation with her mother about her paternity (and that was when she was 12 years old), and that when appellant applied for a birth certificate two years before *Trimble* was decided, she did not give Linn Hunt's name as her father. So much depends upon credibility of witnesses and weight given their testimony, in deciding whether evidence is clear and convincing, only the judge who saw and heard them testify should make that decision.

I am authorized to state that Mr. Justice Purtle joins in this opinion.

IN THE

Supreme Court Of The United States

_____ TERM, 1979

NO. 79-451

Marie Frakes ..... *Petitioner*

VS.

Ray Hunt, et al ..... *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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I. OPINIONS BELOW

The majority opinion delivered in the Arkansas Supreme Court is reported at 266 Ark. 171, 583 S.W.2d 497 (1979) and the dissenting opinion of Mr. Justice Fogleman is reported at 266 Ark. 175, 583 S.W.2d 499, both of which are appended to the Petition for a Writ of Certiorari.

II. JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

III. QUESTION PRESENTED

Whether the doctrine enunciated in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31, (1977) should be given retroactive effect.

IV. STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Ark. Stat. Ann. §61-141(d) provides: An illegitimate child or his descendants may inherit real or personal property in the same manner as a legitimate child from such child's mother or her blood kindred; but such child may not inherit real or personal property from his father or from his father's blood kindred.

The first section of Amendment 14 to the Constitution of the United States of America provides: All persons born or nationalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

V. STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

VI. REASON FOR DENYING THE WRIT

The question now presented is whether the recent U.S. Supreme Court decision in *Trimble v. Gordon* should be given a retroactive effect and applied to the present case. The U.S. Supreme Court did not state whether *Trimble* is indeed to be applied retroactively. Therefore, the general standards by which the Supreme Court determines retroactivity will resolve this issue.

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), involved the issue of whether the rule of criminal procedure excluding evidence illegally seized enunciated by *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) applied to cases decided prior to *Mapp*. In holding that it did not, the Court stated:

> The accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective.
>
> * * *
>
> We believe that the *Constitution neither prohibits nor requires retrospective effect.* As Justice Cardozo said, 'we think the federal constitution has no voice upon the subject.' (emphasis supplied)
>
> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purposes and effect, and whether retrospective operation will further or retard its operation. 381 U.S. 628, 29, 14 L.Ed.2d at 607-8.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), a civil case, the plaintiff had been injured while working on an oil derrick off the Gulf Coast of Louisiana in 1965, and filed suit three years later. After suit was filed the Supreme Court decided in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969), that a one-year statute of limitations, rather than the admiralty principle of laches, applied. However, the U.S. Supreme Court held that *Rodrigue* should not be applied retroactively to bar actions filed before its announcement. In its opinion, the Supreme Court categorized the rules for retroactivity into three separate factors as follows:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'. Finally, we have weighed the inequity imposed by retroactive application, for, "(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." 404 U.S. at 106-07, 30 L.Ed.2d at 306.

In *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), the Court held that although payments to private sectarian schools were unconstitutional, payments made before they were ruled unconstitutional

would not have to be reimbursed, because of the school's actions taken in expectation of reimbursement. The Court stated its recognition that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct."

In the case of *Rebsamen Motors, Inc. v. Morris*, 229 Ark. 483, 317 S.W.2d 141 (1958), the issue was whether an installment note charging interest on a "time price differential" was usurious even though executed prior to a *caveat* given in *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952). The court held that it was not, because the *Hare* decision had overruled a long line of decisions and was therefore intended to apply prospectively only. And in *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968), the Arkansas Court stated:

> That possible hardship on those who have justifiably relied upon the law as announced by the Court in the past stems from the retroactive effect normally given a court decision. Legislative acts which normally operate only in the future avoid this effect. It is for this reason that many of the courts have left such problems for legislative solution. *Whittington v. Flint*, 43 Ark. 504 (1884). In the past we have met the problem by making our decisions operative only in the future. *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952). 244 Ark. at 1253, 429 S.W.2d at 52.

Wawack v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970) further imbedded into Arkansas case law the principle of nonretroactivity for cases where injustice would result from applying an entirely new law retrospectively:

> To sum up, upon the facts before us in the case at bar we have no hesitancy in adopting the modern rule by which an implied warranty may be recognized in the sale of a new house by a seller who was also the builder. That rule, however, is a departure from our earlier cases; so, to avoid injustice, we adhere to the doctrine announced in *Parrish v. Pitts, supra*, by which the new rule is made applicable only to the case at hand and to causes of action arising after this decision becomes final. 248 Ark. at 1100, 449 S.W.2d at 926.

That the new rule of law established by *Wawack* acted only prospectively to prevent injustice was again emphasized in *Leffler v. Banks*, 251 Ark. 277, 472 S.W.2d 110 (1971), where the *Wawack* rule was not applied to a home sale occurring before *Wawack* was announced.

In summary, the Arkansas court has clearly held that decisions will not be applied retroactively where they overrule a long line of cases, or state a new rule of law. In so holding, the Court has considered the equities of a given case. Thus, its approach is quite similar to the United States Supreme Court's approach in constitutional law cases.

An initial question under the law discussed above is whether *Trimble* has established a new principle of law. It is clear that it has. In *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971), the United States Supreme Court held that (1) Louisiana's statutory scheme, barring an illegitimate child who had been acknowledged but not legitimated from sharing equally with legitimate heirs in the father's estate, had a rational basis in view of the state's interest in promoting family life and of directing the disposition of property left within the state, and (2) such statutory scheme did not constitute an invidious discrimination against illegitimate children in violation of

the due process and equal protection clauses. Therefore, the illegitimate child was not allowed to inherit. The Court distinguished the earlier case of *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), where it was stated that laws discriminating against illegitimate children were unconstitutionally suspect, on the basis that *Levy* was a tort action where the illegitimate child had clearly been injured by his mother's wrongful death. In *Labine*, in contrast, the statutes in issue were inheritance statutes, and the Court clearly stated:

> (T)he choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. 401 U.S. at 537, 28 L.Ed.2d at 293.

Although the Court in *Trimble* partially distinguished *Labine*, it did admit "...it is apparent that we have examined the Illinois Statute more critically than the Court examined the Louisiana Statute in *Labine*."

A second important question is what is the purpose of the new rule, and will retroactive application further or retard this purpose. The purpose of *Trimble* is to limit statutory discrimination against illegitimates in matters of intestate succession. However, the opinion recognizes the *substantial state interest* in providing for the stability of land titles and the prompt and definitive determination of the valid ownership of property left by decedents. Thus, these two potentially adverse interests must be balanced in determining whether the *Trimble* decision is to be applied retroactively. Respondents strongly urge that because of

the importance of protecting vested property rights, and because of the confusion which would result from retroactive application, the purpose of *Trimble*, *i.e.*, to protect rights of illegitimates while not unduly compromising state interests in orderly intestate succession, will not be fulfilled by retroactive application.

A third crucial question is whether it would be inequitable to apply *Trimble* to the present case. Petitioner argues that *Trimble* should be applied to her case because Respondents did not rely on the prior status of the law. In so arguing, Petitioner overlooks the fact that Respondents have a vested property right in the real property comprising Linn Hunt's estate. It has been held that where vested property rights are concerned, reliance upon the former law need not be shown, but will be presumed. *Continental Supply Co. v. Abell*, 95 Mont. 148, 24 P.2d 133 (1933); *Rice v. Graves*, 273 N.Y.S. 582, aff'd. 200 N.E. 288 (N.Y. 1936).

Under Ark.Stat.Ann. §61-131, 137 (Cum.Supp. 1977), the heirs of a deceased succeed by inheritance to the ownership of his real property immediately upon his death. This is the general rule in Arkansas and elsewhere, since early vesting of property rights is favored. *McLaren v. Cross*, 236 Ark. 648, 370 S.W.2d 59 (1963); *Cross v. Pharr*, 215 Ark. 463, 221 S.W.2d 24 (1949); *Pfaff v. Heizman*, 218 Ark. 201, 235 S.W.2d 551 (1951).

The Arkansas case of *Dean v. Brown*, 216 Ark. 761, 227 S.W.2d 623 (1950) is very much in point. The issue was whether nieces and nephews of an intestate should be divested of title to her real estate by an adopted child of the intestate. The adoption was invalid because of minor

technical problems. Shortly after the intestate's death, a new legislative act became effective which prohibited attack on an adoption decree after two years. The adopted child argued that this statute should be applied retroactively so that she would inherit the property. The Court denied her claim, stating:

> In the case at bar, the title to the real estate of Mrs. Eva Crawford Priddy vested in the appellees, as her heirs at law, immediately upon her death on February 2, 1947, subject to the husband's courtesy if he was alive; and the Act 408 of 1947 was not adopted until March 28 following. It therefore could not retrospectively operate to divest appellees' title to the real estate of Mrs. Priddy. So, as regards the real estate, the appellant cannot prevail. 216 Ark. at 769.

Similarly, in *Anderson v. Webb*, 241 Ark. 233, 406 S.W.2d 871 (1966), the Court held that property rights already vested should not be divested by retroactive application of legislation. And in *Cupp v. Frazier's Heirs*, 239 Ark. 77, 387 S.W.2d 328 (1965), the Court held that it would not overrule a case involving a rule of property retroactively, but only as to future cases.

The California Court in *County of Los Angeles v. Faus*, 312 P.2d 680 (Cal. 1957) stated the general rule that a decision of the court of supreme jurisdiction overruling a former decision is retrospective, and that the former decision is considered to have never been the law. However, "where a constitutional provision or statute has received a given construction by a court of last resort and contracts have been made or property rights acquired under and in accordance with its decision, such contracts will not be invalidated nor will vested rights acquired under the decision be impaired by a change of construction adopted in

a subsequent decision." Under those circumstances it has been the rule to give prospective, and not retrospective, effect to the later decision. 312 P.2d at 685.

It is clear that Respondents' property rights in Linn Hunt's estate vested at the time of his death, which was in 1972, and in accordance with the laws in effect at the time of his death, which would include Ark.Stat.Ann. §61-141. At the time Linn Hunt died, the Petitioner simply was not his heir under the laws of the State of Arkansas. It is reasonable to suppose that Linn Hunt expected and intended that his property would descend in accordance with the law in effect in 1972. If *Trimble* had been decided before his death, he might well have made a will specifying his heirs.

Furthermore, for nearly seven years, the heirs of Linn Hunt have lived and acted under the assumption that they were the owners of a large and valuable parcel of real property. It must be presumed that their belief has caused them to take certain actions and to refrain from taking other actions. This factor is undoubtedly why, as indicated above, reliance upon the former law with regard to real property rights is presumed.

The Supreme Court of Kentucky has considered whether the *Trimble* decision should be applied retroactively in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1978). The Court decided that its own statute with regard to inheritance by illegitimates was unconstitutional and invalid, but as to the retroactive effect of this holding, the Court stated:

This opinion shall have no retroactive effect upon the devolution of any title occurring before April 26, 1977 (the date of the *Trimble* opinion), except for those specific instances in which the dispositive constitutional issue raised in this case was then in the process of litigation. 560 S.W.2d at 539.

CONCLUSION

It is respectfully submitted that the *Trimble* decision should not be given retroactive effect to an estate and property rights thereunder vesting more than six years ago. Another case might involve the estate of a decedent who died ten, twenty or forty years ago. Application of *Trimble* to old estates would obviously create chaos in land titles. On the contrary, it should apply only to estates of decedents dying after the date of the *Trimble* decision. Up until that time, as was discussed in an earlier portion of this brief, the recent decisions of the United States Supreme Court clearly held that illegitimates could be discriminated against in inheritance statutes. It would be in the best interest of Arkansas, the citizens of Arkansas, and the citizens of the United States to apply *Trimble v. Gordon* prospectively only.

It is respectfully submitted that Arkansas and other states be allowed to determine the proper application of *Trimble* based upon vested property rights and resulting injustices.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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